The Treatment of Article 36 Claims by the Federal Courts: Past Practice and Probable Responses to Legislation Mandating Judicial Review

What approaches have the federal courts taken to addressing Article 36 claims in the past?

For the last two decades, state and federal courts have grappled with hundreds of cases involving alleged violations of Article 36 of the Vienna Convention on Consular Relations. According to an upcoming law review article, "[i]n the last decade alone, there were almost 400 cases in federal courts involving claims under the Vienna Convention on Consular Relations".[1] As the author notes, these statistics "represent only the tip of the iceberg" because they do not include cases litigated in state courts.[2] The body of federal case law on this topic (and in particular the various ways in which the federal courts have responded to Vienna Convention claims) provides useful guidance in assessing how those same courts would apply proposed legislation implementing the right to judicial review for prisoners facing life imprisonment or death.

In general, the federal courts have been unreceptive to Article 36 claims. First, they have limited *review* of those claims by applying procedural bars[3] and by holding that Article 36 does not confer judicially-enforceable individual rights.[4] Second, they have limited the *remedies* available to petitioners whose claims were not otherwise barred. In many cases, they have found that the remedy sought by the petitioner (often, suppression of an incriminating statement) was unwarranted.[5] And in a great number of cases, they have rejected Article 36 claims on the

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[1] Buys, Cindy Galway, Do Unto Others: The Importance of Better Compliance with Consular Notification Rights, 21 DUKE J. INT'L & COMP. L. (forthcoming May 2011), at 1. *Available at* <http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=cindy_buys> .

[2] *Id.* n. 2. The same footnote states that the tally of almost 400 federal court decisions was the "[r]esults of Westlaw search conducted on March 1, 2009 of 'ALLFEDS' database for cases using phrase 'Vienna Convention on Consular Relations' on file with author."

[3] See, e.g., Breard v. Greene, 523 U.S. 371 (1998); Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998); Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

[4] Cf. U.S. v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir. 1980); U.S. v. Superville, 40 F.Supp.2d 672, 678 (D.V. I. 1999); Standt v. City of New York, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); U.S. v. Chaparro-Alcantara, 37 F. Supp.2d 1122, 1125 (C.D. Ill. 1999); U.S. v. Hongla-Yamche, 55 F.Supp.2d 74, 77-78 (D.Mass.1999) (all recognizing individual right and judicial standing) and U.S. v. Tapia-Mendoza, 41 F. Supp 2d 1250, 1253 (D. Utah 1999); U.S. v. Emuegbunam, 268 F.3d 377 (6th Cir. 2001); U.S. v. Jimenez-Nava, 243 F.3d 192 (5th Cir. 2001) (all holding or inferring that Article 36 does not confer an individually-enforceable right).

[5] See, e.g., U.S. v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000); U.S. v. Li, et al., 206 F.3d 56, 61 (1st Cir. 2000) (both declining to rule on the issue of individual rights, but determining that exclusion is not an available remedy); U.S. v. Cordoba-Mosquera, 212 F. 3d 1194, 1196 (11th Cir. 2000); U.S. v. Page, 232 F. 3d 536, 540 (6th Cir. 2000) (no right to have indictment dismissed for Article 36 violation);

grounds that the petitioner failed to show he was prejudiced by the violation.[6] For example, many courts have denied relief because the defendant failed to show how the assistance of the consulate would have augmented or differed from the assistance of counsel.[7]

Although the courts have rejected the vast majority of Article 36 claims on one or more of these grounds, it would be incorrect to conclude that none of these cases raised meritorious claims. On the contrary; some persuasive consular prejudice arguments were dismissed because the reviewing court felt bound by procedural constraints or rejected the availability of judicial remedies.[8] Strong Article 36 claims were sometimes also raised in cases where the courts entertained or granted relief on other grounds, often closely related to the consular assistance issue.[9] And, in a limited number of cases, the federal courts have indeed set aside convictions or

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U.S. v. Ademaj, 170 F.3d 58, 67 (1st Cir. 1999) (noting that the Convention establishes no judicial remedy for its violation, and holding that violation did not warrant vacatur of conviction on appeal).

[6] See, e.g., U.S. v. Esparza-Ponce 7 F. Supp. 2d 1084, 1096 (S.D. Cal 1998) (refusing to "definitively decide this muddled issue [of standing]" but addressing merits of claim of violation nevertheless); U.S. v. Chanthadara, 230 F.3d 1237, 1255-1256 (10th Cir. 2000), cert. denied, 534 U.S. 992, (2001); U.S. v. Ortiz, 315 F.3d 873, 886-887 (8th Cir. 2002) (declining to settle standing issue, but holding that no relief would be afforded where the defendant failed to demonstrate prejudice from the violation). See also U.S. v. Pagan, 196 F.3d 884 (7th Cir. 1999)(mistrial properly denied where the defendant did not show how notice of Article 36 rights would have influenced evidence presented to jury); U.S. v. Chaparro-Alcantara, 37 F.Supp.2d 1122, 1126 (C.D. Ill. 1999) (defendants "failed to establish that they would have stopped talking to the I.N.S. immediately after being advised that they had a right to speak to the Mexican Consulate").

[7] See, e.g., Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir.1996) (where trial counsel presented no mitigation, concluding that the extensive mitigating evidence later obtained through consular assistance "is merely the same as or cumulative of evidence defense counsel had or could have obtained"); U.S. v. Briscoe, 69 F.Supp.2d 738, 747 (D. V. I. 1999) (defendant "has not explained how the help the consul might have given him would have added to or varied from the assistance that an attorney would have provided, which assistance he knowingly waived").

[8] See, e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006) (denying consideration on the merits of petitioner Bustillo's argument that the VCCR violation resulted in his wrongful conviction, because Article 36 claims "may be subjected to the same procedural default rules that apply generally to other federal-law claims"); U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 980 n. 13 (N.D. Ill. 2002) (observing that, although participation of the Consulate could have made a difference at penalty phase, "[s]ince there is no clear Supreme Court precedent about remedies for Vienna Convention violations, it is unlikely that this, or any other Court could premise relief on this basis"). See also United States v. Duarte-Acero, 296 F.3d 1277, 1281-82 (11th Cir. 2002)(where consular involvement would likely have prevented defendant's surrender for re-prosecution by U.S. authorities, deferring to State Department view that "the only remedies...are diplomatic, political, or derived from international law").

[9] See, e.g., U.S. ex rel. Madej v. Schomig, 223 F. Supp. 2d 968, 980 (N.D. Ill. 2002) (because "this Court has already granted Petitioner relief from his death sentence [for ineffective assistance of counsel], this issue becomes moot"); Osagiede v. U.S., 543 F.3d 399 (7th Cir. 2008) (remanding case for prejudice determination after finding trial counsel ineffective for failing to raise or seek a remedy for Article 36 violation); Deitz v. Money, 391 F.3d 804 (6th Cir. 2004) (remanding for ineffective assistance

remanded cases for failure to provide consular information and notification, albeit for violations of related regulatory or statutory provisions rather than on the basis of the VCCR itself.[10]

Assuming that remedial legislation was adopted requiring federal judicial review of Article 36 claims, how would the federal courts apply that requirement?

Legislative language introduced in the last Congressional term would have conferred jurisdiction on the federal courts to review Article 36 violations in the cases of individuals sentenced to death or to life imprisonment. Specifically, that legislation provided:

> *Notwithstanding any other provision of law, on the enactment of this Act and thereafter, a federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations filed by an individual convicted (1) prior to the date of enactment of this Act and sentenced to a term of life in prison or death; or (2) after the date of enactment of this Act and sentenced to a term of life in prison or death.*
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> *(b) RELIEF.—The court may conduct evidentiary hearings if necessary to supplement the record and, upon a finding of actual prejudice, shall order a new trial or sentencing proceeding.*
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> *(c) CRITERIA FOR RELIEF.—In order to be entitled to relief—*
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> *(i) an individual described in (a)(1) must make a showing of actual prejudice to the criminal conviction or sentence as a result of the violation; and*
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> *(ii) an individual described in (a)(2) must make a showing of cause for any procedural default and actual prejudice to the criminal conviction or sentence as a result of the violation.*

determination, including counsel's failure to seek consular assistance); see also Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding Article 36 claim procedurally defaulted but remanding for resentencing because trial counsel provided ineffective assistance by failing to inform client of consular rights).

[10] See, e.g., U.S. v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980) (dismissing indictment for illegal re-entry, where the INS failed to comply with consular advisement regulation and defendant demonstrated prejudice); United States v. Juvenile (RRA-A), 229 F.3d 737, 746 (9th Cir. 2000) (construing the parental notification provision of Juvenile Delinquency Act as requiring that arresting officer must "delay interrogation of the [foreign] juvenile for a reasonable time to allow consular notification and response" whenever parental notification was not possible); United States v. Juvenile Male, 528 F.3d 1146, 1160 (9th Cir. 2008) (in decision to remand, recognizing as a contributing factor the value of consular assistance and testimony in establishing that foreign defendant was a juvenile rather than an adult offender).

(d) FILING DEADLINE.—(1) A petition for review under this section must be filed within one year of the later of—

(A) the date of enactment of this Act;

(B) the date on which the petitioner's State court judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; or

(C) the date on which the impediment to filing a petition created by State action in violation of the Constitution or laws of the United States is removed, if the petitioner was prevented from filing by such State action.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward the one-year period of limitation.

(e) LIMITATION.—A petition for review under this section must be part of a petitioner's first habeas corpus application under chapter 153 of title 28, United States Code, except that if a petitioner has already filed a habeas corpus application at the time of enactment of this Act or if such application must be filed prior to one year after the date of enactment of this Act, such petition for review under this section must be filed within one year of the enactment date or within the period prescribed by subsection (d)(1)(C), whichever is later. No petition filed in conformity with the requirements of the preceding sentence shall be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings other than as specified in subsection (c).

This language clearly contemplated that the federal courts would review these claims in the course of federal habeas proceedings. Below, we describe how the courts will likely approach this task for the two categories of prisoners identified in the proposed language.

1. Prisoners Already Sentenced to Death or Life Imprisonment

Since prisoners already sentenced to death or to life imprisonment would have the right to litigate Article 36 claims unencumbered by procedural default rules, it is likely that many will file habeas petitions raising these claims – or will raise the claim in the course of ongoing habeas proceedings. As an initial matter, the court will need to ascertain whether the petitioner has met the statute of limitations for filing his Article 36 claim.

With regard to the merits of the claims, in habeas proceedings the burden is on the petitioner to plead facts which entitle him to relief. The petitioner would therefore need to plead facts showing that (1) a violation of Article 36 occurred; and (2) that he was prejudiced by the violation. If the petitioner fails to plead facts that establish a prima facie violation and prejudice, the court will likely dismiss the claim without a hearing.

The great majority of petitioners are likely to fail at this stage, simply because they are unable to show prejudice resulting from the violation. This is particularly true for foreign nationals whose home countries lack an established consular assistance program, and for foreign nationals sentenced to life imprisonment who never faced capital murder charges. At a minimum, the petitioner will need to demonstrate that he would have invoked his right to consular notification, and that the consulate would have provided meaningful assistance in his case.

Where a petitioner has met his obligation to plead sufficient facts to entitle him to relief, the court may order a hearing on the merits of the claim. In general, if the state fails to present evidence rebutting the basis for the claim, a "credible assertion of the assistance the consulate would have provided would entitle the petitioner to an evidentiary hearing."[11]

2. Prisoners Sentenced to Death or Life Imprisonment After Enactment of the Legislation

Petitioners sentenced to death or life imprisonment after the enactment of the legislation will follow the same procedure as those already convicted. Their claims will face additional hurdles, however.

First, if this legislation is passed, compliance with Article 36 will rise dramatically, particularly in the most severe cases. State and federal law enforcement will receive training on compliance with Article 36, and the number of violations will decline precipitously. This is precisely what happened in Oklahoma in the wake of decisions by the Oklahoma Court of Criminal Appeals to grant post-conviction relief.[12]

Second, since petitioners will be subject to procedural default rules, they will be required to raise and litigate the Article 36 violations in state court. Each state has a distinct set of rules that govern the presentation of claims on appeal and in post-conviction applications. In most states, however, it will be necessary that petitioners raise the Vienna Convention violation in their first state post-conviction application. If the violation is discovered before or during trial, it will likely need to be raised in a motion filed with the trial court, and then litigated on appeal. If

[11] Osagiede v. U.S., 543 F.3d 399, 413 (7th Cir. 2008).

[12] See Torres v. State, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005) (in Avena petitioner's case, applying "review and reconsideration" and finding prejudice at penalty phase arising from Article 36 violation); see also Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding procedurally-defaulted Article 36 claim prejudicial and remanding instead on related Sixth Amendment grounds). After the Oklahoma Court of Criminal Appeals granted relief in *Valdez*, state officials promptly complied with Article 36 in the case of the next Mexican national to face the death penalty. See Marquez-Burrola v. State, 157 P.3d 749, 761 (Okla. Crim. App. 2007) ("[a]fter his arrest but before he was interviewed, Appellant was advised by police...that as a citizen of Mexico, he had a right to request assistance from the Mexican consulate"). Data compiled for the Mexican Foreign Ministry indicates that, compared to other jurisdictions, consular notification rates are significantly higher in Oklahoma for the most serious cases involving Mexican defendants.

petitioners fail to comply with these rules, and cannot establish cause and prejudice for their default, the federal courts will not consider their Article 36 claims.

Conclusion

It is unlikely that remedial legislation along the lines of the language reproduced above would result in any significant shift in the way lawyers are already litigating Article 36 claims or, in practical terms, how these claims would be reviewed and resolved by the courts. As in the past, many potential claims would still stumble at the first hurdle by failing to make any credible showing that the defendant's consular rights were violated or that any harm conceivably flowed from that violation.

Nonetheless, the proposed legislation would clear away the procedural and conceptual obstacles that in the past may have prevented many federal courts from reaching an unencumbered determination of the merits of Article 36 claims. By eliminating the need to argue the availability of remedies, it would promote the efficient determination of claims by encouraging counsel to focus their pleadings on the prejudice question. It would also ensure that meritorious Article 36 claims would receive thorough and uniform review, including access to an evidentiary hearing and to an appropriate remedy, where warranted.

Appendix 1: Excerpts from post-*Osagiede* determinations of Article 36 claims by federal district courts

BRUNO CHOINIERE
v.
UNITED STATES OF AMERICA.

Cause No. 3:07-CV-27 RM, Arising from Cause No. 3:05-CR-56.
United States District Court, N.D. Indiana, South Bend Division (January 14, 2009).

OPINION AND ORDER
ROBERT L. MILLER Jr., Chief District Judge.
[....]

> To show prejudice, the defendant must "explain the nature of the assistance he might have received had he been alerted to his Article 36 rights." Osagiede v. United States, 543 F.3d at 413. The court further stated that "to merit an evidentiary hearing, [the defendant] must indicate how he proposes to show a realistic prospect of consular assistance and provide some credible indication of facts reasonably available to him to support his claim." Id. The court found that the record revealed that the defendant had a special need for services within the power of the consulate; there were tape recordings of individuals with strong Nigerian accents that were difficult to decipher and the consulate might have provided funds for a proper analysis of these tapes or might have identified regional dialects, offered an accurate voice analysis or even translated the wiretaps. Id. The Nigerian consulate also

might have located the defendant's cousin who was connected to the case, but had returned to Nigeria.

The Osagiede court also noted that the defendant must show that the Nigerian consulate would have assisted him. Osagiede v. United States, 543 F.3d at 413. "The decision to render assistance to a foreign detainee, which gives significance to the obligations imposed by the Convention, rests in the discretion of the Nigerian consulate." Id. To obtain an evidentiary hearing, the defendant had to make a credible assertion of the assistance the consulate would have provided, but wasn't required to submit official documents, statements or affidavits from the Nigerian consulate in advance of the hearing. Id. At the hearing, the defendant would need to provide evidence sufficient to prove he was prejudiced by the failure to notify him of his Article 36 rights. Id. at 413, n. 13.

Mr. Choiniere submits an affidavit claiming that he was never advised of his rights under Article 36 and received no communication from his consulate. The government responded by attaching a copy of the fax sent to the Canadian Consulate shortly after Mr. Choiniere was arrested. The government doesn't contend that Mr. Choiniere was notified of his right to consular assistance. To establish prejudice, Mr. Choiniere must establish that the consulate could have assisted with his case and would have done so. Id. at 413. He needs to "provide some credible indications of facts reasonably available to him to support his claim." Osagiede v. United States 543 F.3d at 413.

The record doesn't suggest that Mr. Choiniere had any special need for services typically within the power of the consulate. He doesn't allege that he needed assistance locating witnesses or evidence, translating documents, or understanding the United States's legal system. Mr. Choiniere had the financial means to hire his own defense attorney and an investigator to assist in his defense. Further, Mr. Choiniere also hasn't shown that even if he was informed of his right to contact the consulate, the consulate would have provided assistance. This case therefore is distinguishable from Osagiede in that the record before the court doesn't show evidence of possible prejudice. This court finds that Mr. Choiniere's claims relating to the Vienna Convention don't warrant an evidentiary hearing.

UNITED STATES OF AMERICA, Plaintiff,
v.
ALBERTO ELLIS, Defendant.
Nos. 09 C 3030, 07 CR 632
United States District Court, N.D. Illinois, Eastern Division (May 27, 2009).
MEMORANDUM OPINION AND ORDER
MILTON I. SHADUR, Senior District Judge

[....]

Ellis' situation differs dramatically from that of the petitioner in Osagiede—none of the cultural differences, unfamiliarity with the justice system and other factors that might make a defendant's contact with the consulate from his or her home country valuable appear to fit Ellis at all. To the contrary, it would appear likely that Ellis' long-term residency in the United States has made him pretty much the equivalent of a native son (but for the lack of

a citizenship certificate). Before this Court is obligated to conduct an evidentiary hearing, then, Ellis must advance some plausible predicate for his being able to surmount the second Strickland hurdle.

Accordingly Ellis is ordered to supplement his motion on or before June 8, 2009 to provide at least a threshold showing that his being given access to the Jamaican consulate might have led to a more favorable result. This Court will then determine what if any further proceedings are required.